

Tennessee Ethics Commission
May 18, 2009
Minutes

The Tennessee Ethics Commission met on Monday May 18, 2009, at 8:30 a.m. in Room 30 of the Legislative Plaza. Chairman R. Larry Brown and Commissioners Charles H. Farmer, Nathaniel S. Goggans, John K. King, Linda W. Knight, and Dianne F. Neal were present. Chairman Brown called the meeting to order at 8:40.

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After discussion, Commissioner King moved to approve the minutes. After the motion was seconded, Commissioner Knight offered corrections to the minutes. After discussion, the motion to approve the minutes, as corrected, passed unanimously.

The Commission agreed to move Item 1 – Discussion of Sunset/Merger Implications to the end of the meeting.

Item 2 – Disclosure of Interest Rules 0580-06

After discussion, Commissioner Knight moved to rescind Rule 0580-06 as posted on the Secretary of State's website and redraft the rule. The motion was seconded and passed unanimously.

Item 10 - Random Selection of Lobbyists to be Audited

Senior Attorney General Janet Kleinfelter was present to observe the selection of lobbyists for audit. After discussion, Commissioner Neal moved to conduct the audit in a completely random manner, such that no person would have his or her name removed from the pool of lobbyists to be selected for audit because he or she had been audited the previous year. After the motion was seconded, Commissioner Farmer offered an amendment to provide a one (1) year exception for audited lobbyists, such that their name would be removed from the pool of lobbyists to be selected for audit the subsequent year. After discussion, Commissioner Farmer withdrew the amendment. After discussion, the motion passed unanimously.

After discussion, Commissioner Knight moved to select four percent (4%) of lobbyists for audit. The motion was seconded and passed unanimously. Compliance Officer Daven Harrell used an automated random number selection program to select four percent (4%) of lobbyists for audit. It was announced that four percent (4%) of lobbyists is nineteen (19) individuals. The lobbyists selected for audit were: Dale Allen, James William Brown, Lindsay Craig, Eddie Davidson, John Farris, Jack Fosbinder, Leslie Hafner, Herbert Hilliard, Steve Mitchell, Margaret Morrison, Claude Presnell, Roxanne Reiley, Marissa Richmond, Holly Salmons, Stephen Smith, Jim Spears, Jeff Van Dyke, Alan West and Thomas Williams.

Item 3 – Proposed Operating Procedures

After discussion, Commissioner Goggans moved to use the draft operating procedures submitted by Commissioner Neal on March 16, 2009, revised and consolidated on May 14, 2009, as the basis for the Commission's discussion. The motion was seconded. The Commission then discussed specific items in the draft operating procedures.

Commissioner Knight moved to add the words "and communicate with officials in the executive and legislative branches" to the end of I(A)(3). After discussion, Commissioner Goggans amended his motion to include the words "and communicate with officials in the executive and legislative branches

when necessary” at I(A)(3).

Commissioner Knight then offered an amendment to include the words “and communicate with officials in the executive and legislative branches when appropriate in the exercise of their judgment” at I(A)(3). After discussion, the motion was seconded and passed unanimously.

Commissioner Knight moved to include the words “any Commissioner has the right to communicate with office of the attorney general” in the operating procedures. After the motion was seconded, Commissioner Knight amended the motion to include “judicial” at I(A)(3) such that I(A)(3) would read, “[a]pppear before the legislature and communicate with officials in the executive, legislative and judicial branches when appropriate in the exercise of their judgment.” The motion, as amended, passed unanimously.

Commissioner Knight moved to include the words “the Commission has the right at any time overrule actions of the staff” in the operating procedures. After the motion was seconded and discussed, the motion passed four (4) to two (2).

The Commission discussed the procedure for a Commissioner to chair a meeting in the absence of the Chair. After discussion, Commissioner Farmer moved to name Commissioner King Vice-Chair. The motion was seconded and passed unanimously.

After discussion, Commissioner Knight moved to delete the sentence beginning “[i]f the Chair is to the absent, he or she....” at I(B)(1) and include the words “if the Chair is to be absent, the Vice-Chair shall preside.” The motion was seconded and passed unanimously.

After discussion, Commissioner Knight moved to add at II(A)(11) the language “the authority to respond to media inquiries does not include the writing of letters to the editor or op-eds or expressing opinions about matters of Commission policy or other government policy.” After discussion, the motion was withdrawn.

After discussion, the Commission reached consensus to delete II(B)(2) through (8). After discussion, the Commission reached consensus to include at III(D)(1)(a) the words “Tennessee Supreme Court,” and “Canon 3” so that section will read “[t]he Commission will adopt Tennessee Supreme Court Rule 10, Canon 3, Section E of the Tennessee Code of Judicial Conduct regarding recusal.”

After discussion, Commissioner Knight moved to include the language “the Commission will not assert the deliberative process privilege until such time as an appellate court in Tennessee has issued an opinion in a case holding that such privilege applies to an entity similar to the Commission” in the operating procedures. After the motion was seconded and discussed, the motion was withdrawn.

After discussion, Commissioner King made a grammatical correction to the proposed operating procedures.

After discussion, the Commission heard from Ms. Ann Butterworth, State Open Records Director. The Commission reached consensus to strike the proposed language in bold type at VI(A)(5), which read “the Commission must decide if that Commissioner draft (a) may circulate to all other Commissioners and (b) may be posted ahead of the public meeting.”

After discussion, Commissioner Neal moved to delete the words “within 72 business hours” at VI(C)

(3)(b) and include the words “within a reasonable time following adoption and circulation of the opinion” so that VI(C)(3)(b) would read “[s]taff attorneys shall prepare the final Opinion following adoption and circulate it to the Commissioners for review within a reasonable time following adoption.” The motion was seconded and passed unanimously.

After discussion, Commissioner Knight moved to delete VI(C)(3)(b) from the operating procedures. The motion was seconded and passed unanimously.

After discussion, Commissioner Goggans moved to add the language “the Executive Director and the staff counsel are authorized to revise and reissue the informal response prior to consideration or revision by the Commission” as a part (4) to subsection VII(B). After discussion, Commissioner Neal offered an amendment that VII(B)(4) begin with the statement “[n]othing in this section shall prevent the Executive Director and staff counsel from issuing a corrected informal response at any time prior to consideration or revision by the Commission.” Commissioner Goggans accepted that amendment. Commissioner Knight offered an amendment that the language “if in the meantime, the matter about which the informal response was requested has already occurred and the requestor has acted on the erroneous informal response, then the requestor shall not be sanctioned” be added to VII(B)(4). After discussion, Commissioner Knight withdrew her amendment. The motion, as amended by Commissioner Neal, was seconded and passed unanimously.

After discussion, the Commission unanimously passed Commissioner Goggans’ original motion to approve the operating procedures with the amendments that the Commission had separately approved during the preceding discussion. It was agreed that Commissioner Neal would compile the revisions and the revised document would be circulated.

Item 4 – Informal Penalty Proceedings: Katsiros, Johnathan

After discussion, Commissioner Farmer moved to deny Mr. Katsiros’ request for reconsideration and accept the recommendation not to impose a Class 2 Civil Penalty. The motion was seconded and passed unanimously.

Item 5 – Lobbyist and Audit Reports

After discussion, Commissioner Farmer moved that the Commission seek no civil penalties against a lobbyist or employer based on the discovery, in the course of the 2008 random lobbyist audit, of a violation by the lobbyist or his or her employer(s) and, in the future, make the decision whether to seek civil penalties based on random audits on a case by case basis. The motion was seconded. Commissioner Neal directed staff to include in the minutes the basis for Commissioner Farmer’s motion as stated by Commissioner King. Commissioner King stated that, by seeking no civil penalties against lobbyists or employers based on the 2008 random lobbyist audits, the Commission is sending a message to the regulated community that the Commission understands that the regulated community is still in the learning process, but the Commission is paying attention and will be making future decisions on a case by case basis. After discussion, the motion passed unanimously.

After discussion, Commissioner Neal moved that any privilege regarding the General Counsel’s legal memorandum recommending that the Commission not impose sanctions based on the 2008 random lobbyist audits had been waived and that the memorandum be released. The motion was seconded and passed unanimously.

Item 9 - Informal Assessment Proceedings – Public Official Disclosure Statements *Michael Hinson*

Mr. Michael Hinson, a local official, was present and addressed the Commission. After hearing from Mr. Hinson and discussing the matter, Commissioner Farmer moved to assess a fifty-dollar (\$50) civil penalty for Mr. Hinson's failure timely to file his disclosure of interest statement that was due on January 31, 2009, in compliance with the statutory computation of such penalties. The motion was seconded. After discussion, the motion passed five (5) to one (1), with Commissioner King voting no.

Melvin Carrier

After discussion, Commissioner Knight moved to assess a five hundred dollar (\$500) civil penalty for Mr. Carrier's failure timely to file his disclosure of interest statement that was due on January 31, 2009, in compliance with the statutory computation of such penalties. The motion was seconded and passed unanimously.

Stan O'Neal

After discussion, Commissioner Knight moved to assess a one hundred twenty five dollar (\$125) civil penalty for Mr. O'Neal's failure timely to file his disclosure of interest statement that was due on January 31, 2009, in compliance with the statutory computation of such penalties. The motion was seconded and passed unanimously.

Mary Smith

After discussion, Commissioner Knight moved to assess a one hundred twenty five dollar (\$125) penalty for Ms. Smith's failure timely to file his disclosure of interest statement that was due on January 31, 2009, in compliance with the statutory computation of such penalties. The motion was seconded and passed unanimously.

Vernon Justes

After discussion, Commissioner King moved to assess a fifty dollar (\$50) civil penalty for Mr. Justes' failure timely to file his disclosure of interest statement that was due on January 31, 2009, in compliance with the statutory computation of such penalties. The motion was seconded and passed unanimously.

Benny Spencer

After discussion, Commissioner Farmer moved to assess a one hundred seventy five dollar (\$175) dollar civil penalty for Mr. Spencer's failure timely to file his disclosure of interest statement that was due on January 31, 2009, in compliance with the statutory computation of such penalties. The motion was seconded and passed unanimously.

Item 13 – Review of Informal Response: Cates, Ashley, No. 09-53B

After discussion, Commissioner Knight moved to revise the informal response to provide that it is permissible for an official in the executive or legislative branch to accept out-of-state travel reimbursement from an employer of a lobbyist to appear as a speaker at a program that is relevant to the official's expertise. After the motion was seconded, there was further discussion. Commissioner Knight amended the motion to provide that it was permissible for the for the state official and the state legislator, to have accepted the travel reimbursement from an employer of a lobbyist to appear as a presenter at a conference at which the subject matter was relevant to these individuals' area of expertise. The rationale was that, under the facts presented, the travel reimbursement constituted "[b]enefits resulting from business, employment, or other outside activities of a candidate or official . . . , if such benefits are customarily provided to others in similar circumstances and are not enhanced due to the status of the candidate or official," which is an exception to the gift ban permitted under T.C.A. § 3-6-305(b)(1). After discussion, the motion, as amended, passed unanimously.

Item 1 – Discussion of Sunset/Merger Implications

After discussion, Commissioner Farmer moved to seek a new Executive Director, give the current Executive Director three (3) months' severance and assign the new Executive Director the task of addressing staffing and budget to the satisfaction of the Commission. The motion was seconded and deliberation followed.

Commissioner Goggans proposed an amendment to provide that the Commission relieve the Executive Director immediately. After discussion, Commissioner King offered an amendment to provide that the Commission terminate the Executive Director's employment immediately and, unless the continuation of pay and benefits is prohibited, terminate his employment with three (3) months of pay and benefits.

After discussion, Commissioner Farmer amended the motion to provide that the Executive Director's employment be terminated with one-fourth of his current year's salary and benefits.

After discussion, the Commission restated that the motion before the Commission, as amended, was to terminate the Executive Director's duties immediately, and to offer a three (3) month, or one-fourth year, severance package. The Commission heard from Mr. Mark Woods from the Office of the Secretary of State with respect to what is permitted with regard to immediate termination of duties but continued compensation for some period of time.

After discussion, Commissioner Farmer moved to place the Executive Director on administrative leave immediately and terminate his employment effective August 10, 2009. The motion was seconded. After discussion, the motion passed five (5) to one (1), with Chair Brown voting no.

The Commission then directed General Counsel Himmelreich to terminate the Executive Director's access to the Commission office and Commission records, such as his email account and Internet access. At Mr. Androphy's request, the Commission directed that Mr. Androphy could retain his e-mail access through May 22, 2009.

After discussion, Commissioner Goggans moved that Rebecca Bradley undertake the day-to-day operations of the Commission. After being seconded, the motion was amended to allow Ms. Bradley to have signature authority. After discussion, the motion as amended passed unanimously.

The Commission agreed to hold its next meeting Wednesday June 3, 2009, at which staff issues will continue to be discussed. The items remaining on the agenda for this meeting will continue to be designated by the same item numbers on the June 3 agenda, and additional agenda items will be given the next higher item numbers.

The meeting was adjourned at 3:46